

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: May 23, 2018

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Harper, Trierweiler) *Att WK? SMC.*
Division of Economics (Draper) *ED*

RE: Docket No. 20180085-GU – Petition by Peoples Gas System for issuance of an order to the City of Leesburg and South Sumter Gas Company, LLC, to show cause why they should not be regulated by the Commission as a public utility as defined in Section 366.02(1), F.S., etc.

AGENDA: 06/05/18 – Regular Agenda – Motions to Dismiss – Oral Argument Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Polmann

CRITICAL DATES: May not be deferred – statutory deadline for issuing final order on declaratory statement is July 1, 2018

SPECIAL INSTRUCTIONS: Place after Docket No. 20180055-GU

Case Background

On April 2, 2018, Peoples Gas System (Peoples) filed a petition pursuant to Sections 120.565, 366.02(1) and 366.04(3)(b), Florida Statutes (F.S.), requesting that the Commission issue an order to show cause the City of Leesburg (Leesburg) and South Sumter Gas Company (SSGC) as to why they should not be regulated by the Commission as a public utility as defined in Section 366.02(1), F.S. The Petition also requests that, in the alternative, the Commission issue a declaratory statement as to which utility, either Leesburg or SSGC, Peoples should negotiate with in an effort to resolve the territorial dispute initiated by Peoples in Docket No. 20180055-GU (Petition to resolve territorial dispute in Sumter County and/or Lake County with City of

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Leesburg and/or South Sumer Gas Company, LLC by Peoples Gas System). SSGC and Leesburg requested intervention in this docket.

On April 26, 2018, SSGC filed a motion to dismiss Peoples' Petition (SSGC's motion to dismiss) and a motion for oral argument. On the same day, Leesburg also filed a motion to dismiss Peoples' Petition (Leesburg's motion to dismiss) and a motion for oral argument. On May 3, 2018, Peoples filed responses to SSGC's and Leesburg's motions.

This recommendation addresses whether the Commission should grant SSGC's and Leesburg's motions to dismiss. Pursuant to Section 120.565(3), Florida Statutes (F.S.), a final order on the Petition for Declaratory Statement must be issued within 90 days, which is July 1, 2018. The Commission has jurisdiction pursuant to Section 120.565 and Chapter 366, F.S.

Discussion of Issues

Issue 1: Should oral argument on SSGC's and Leesburg's Motions to Dismiss be granted?

Recommendation: Yes. Oral argument on SSGC's and Leesburg's Motions to Dismiss should be granted. The parties should be allowed 5 minutes per side to make their arguments. (Harper)

Staff Analysis: Procedural Rule 25-22.0022(1), F.A.C., provides that a request for oral argument should be timely filed and shall state with particularity why oral argument would aid the Commission in understanding and evaluating the issues to be decided. Rule 25-22.0022(7), F.A.C., states that oral argument at the Agenda Conference will be entertained for dispositive motions such as motions to dismiss. SSGC's and Leesburg's requests for oral argument on their motions were timely filed. SSGC's and Leesburg's motions request 10 minutes be allowed for oral argument.

Peoples filed a response in opposition to the requests for oral argument, stating that oral argument would not assist the Commission in its ruling on the motions. However, Peoples asks that if the Commission decides to grant oral argument that Peoples be given an amount of time equal to the time granted to SSGC and Leesburg.

Rule 25-22.0022(3), F.A.C. provides that granting or denying a request for oral argument is within the sole discretion of the Commission. Staff believes that oral argument will assist the Commission in understanding and evaluating issues and arguments raised in the motions. If oral argument is granted, 5 minutes for each side appears to be reasonable.

Issue 2: Should the Commission grant SSGC's and Leesburg's Motions to Dismiss Peoples' Petition?

Recommendation: Yes. The Commission should grant SSGC's and Leesburg's Motions to Dismiss. (Harper)

Staff Analysis: The Commission should dismiss Peoples' Petition because: (1) staff does not believe the Commission should exercise its discretion to issue a show cause order in this docket; and (2) the alternative request for a declaratory statement does not meet the necessary requirements for a declaratory statement. Staff's analysis is discussed in detail below.

Peoples' Petition

The first part of Peoples' Petition asks the Commission to issue an order or orders to show cause Leesburg and SSGC for acting as a public utility. The Petition states that Leesburg is a Florida municipality which operates a natural gas distribution system in a portion of Lake and Sumter Counties and is a "natural gas utility" as defined by Section 366.04(3)(c), F.S., subject to the Commission's statutory jurisdiction. The Petition states that SSGC is a Florida limited liability company formed on or about March 22, 2017, and Peoples believes SSGC currently provides no natural gas service and has no customers.

Peoples' Petition alleges that Leesburg and SSGC have entered in an agreement for the construction, purchase, and sale of certain natural gas distribution facilities for the purpose of providing natural gas service to customers located within the service area described by the agreement. The Petition states Leesburg will pay to SSGC each month a portion of the revenues charged to natural gas customers within the service area (i.e., they will share the revenues from the provision of natural gas service to the customers in the service area). Peoples' Petition further states that the City of Leesburg has adopted an ordinance, Section 22-250 of the City's Code of Ordinances, which establishes the rates to be charged to Leesburg customers within the service area pursuant to the agreement between Leesburg and SSGC.

Peoples attached the agreement between SSGC and Leesburg to its Petition. Peoples' Petition argues that the agreement between SSGC and Leesburg is evidence that SSGC and Leesburg are acting as a public utility. For example, Peoples cites Section 366.02(1), F.S. which defines a public utility:

... every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying...gas...to or for the public within this state.

Peoples argues that while according to the plain meaning of the statute a municipality such as Leesburg is not a public utility, a partnership, association, or other legal entity which supplies natural gas to the public is a public utility under Section 366.02(1), F.S. Peoples states that Section 366.02, F.S., does not define the terms partnership, association, other legal entity, but Peoples submits that by the plain and reasonable reading of those words, the agreement between SSGC and Leesburg meets that description.

Peoples' Petition also states that the nature of the agreement is such that SSGC and Leesburg are partnering or associating to supply gas to the public. Peoples states that there is no purchase price or closing date in the contract, and, unlike a typical purchase and sale agreement, this agreement contemplates a continuing association between SSGC and Leesburg for an initial term of up to 30 years for the supply of natural gas to the public, thereby usurping or circumventing the regulatory power of either the Commission or the Leesburg City Commission.

The second part of Peoples' Petition is a request, in the alternative, for a declaratory statement. Peoples seeks a declaratory statement from the Commission as to which utility (Leesburg or SSGC, or a partnership, joint venture or other legal entity created by the agreement between the two) Peoples should negotiate with in an effort to resolve the territorial dispute in Docket No. 20180055-GU, which is the Commission docket established to resolve the territorial dispute between Peoples and SSGC and Leesburg. Peoples alleges that the Commission's determination of which utility (Leesburg or SSGC) it must work with to resolve the dispute described in the territorial dispute docket (Docket No. 20180055-GU) will affect its substantial interests.

Peoples' Petition states that a declaratory statement "will involve the Commission's determination as to whether the Agreement creates a separate entity which is a 'public utility' as defined Section 366.02(1), Florida Statutes." Peoples refers to Section 180.06, F.S., in its Petition, stating that the section lists the activities authorized by municipalities and "private companies" such as SSGC. Peoples concludes that it is "in doubt regarding which of SSGC, Leesburg, or another entity create by the agreement, should have sought Peoples' consent to the Construction of the System, which is ongoing."

SSGC's and Leesburg's Motions to Dismiss

SSGC argues that the Commission should decline the invitation to issue the requested show cause order. SSGC states that the Commission has the right to initiate a show cause proceeding, not a party. Further, SSGC argues that a show cause order would be inappropriate because Peoples' failed to plead sufficient facts as to a violation of order, rule, or statute.

SSGC argues that Peoples' alternative request for declaratory statement should be denied because the requested declarations would require a resolution of pending, disputed issues, which would be inconsistent with the purpose and intention of the declaratory statement statutes and rules. SSGC also states that the declarations sought by Peoples' Petition are directed solely to the conduct of third persons: SSGC and Leesburg. Further, SSGC argues that Peoples' request for declaratory statement is dependent on speculative and uncertain facts and events that affect the future actions of third parties rather than Peoples' own particular facts and situation.

Additionally, SSGC argues that Peoples is attempting to utilize the declaratory statement procedures to resolve the pending litigation in its favor rather than as a means to avoid litigation. SSGC states that the subject matter of the declaration request by Peoples is the same subject matters at issue in Docket No. 20180055-GU and, thus, cannot be resolved by declaratory statement.

Like SSGC, Leesburg argues that the Peoples' requested show cause order is unnecessary. Leesburg states that many of Peoples' allegations are disputed in Docket No. 2018055-GU and,

thus, should be addressed in that docket only. In addition, Leesburg argues that Peoples' declaratory statement petition should be dismissed because Peoples' Petition inappropriately requests the Commission to opine on the conduct of Leesburg and SSGC and matters that are currently pending in Docket No. 20180055-GU. Additionally, Leesburg states that Peoples' request for declaratory relief asks the Commission to interpret Section 180.06, F.S., which is not applicable to the facts and should not be considered in the analysis of the declaratory statement.

Peoples' Response to SSGC's and Leesburg's Motions to Dismiss

Peoples asserts that SSGC and Leesburg are acting as a public utility. Peoples argues it has properly stated a cause of action in its Petition for issuance of a show cause order. Peoples admits that the underlying facts alleged in its Petition involve SSGC and Leesburg, but argues that it seeks Commission guidance concerning which entity Peoples needs to resolve the dispute with and which entity would be responsible for seeking consent from Peoples for operation of a system under Section 180.06, F.S. Peoples also argues that while it is true that Docket No. 20180055-GU and its Petition in this docket involves similar matters, there is little chance for inconsistent rulings. Peoples states that unless the Commission declares that it intends to either consolidate the two dockets or resolve the issues raised by Peoples' Petition in this docket, it would be appropriate for the Commission to issue the orders to show cause and/or a declaratory statement in this docket.

Peoples' response to Leesburg's Motion to Dismiss reiterates its belief that SSGC and Leesburg are jointly selling natural gas to the public and are acting as a public utility. Peoples also argues that an answer to its requested declaratory statement is necessary because Leesburg's motion highlights the need for clarity as to the applicability of Section 180.06, F.S., which Peoples states applies to activities involved with building a natural gas distribution systems.

Standard of Review for Motion to Dismiss

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. *Id.* When making this determination, all reasonable inferences drawn from the petition must be made in favor of the petitioner. *Id.* All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not, the pleading should be dismissed. *Kislak v. Kreedian*, 95 So. 2d 510 (Fla. 1957).

In determining the sufficiency of the petition, the Commission must confine its consideration to the petition and the grounds asserted in the motion to dismiss. *Flye v. Jeffords*, 106 So. 2d 229 (Fla. 1st DCA 1958). Moreover, the Commission must construe all material facts and allegations in the light most favorable to the petitioner in determining whether the petition is sufficient. *Matthews v. Matthews*, 122 So. 2d 571 (Fla. 2d DCA 1960).

Staff's Analysis and Recommendation

Staff recommends that the Commission grant SSGC's and Leesburg's Motions to Dismiss Peoples' request for show cause orders. The decision to issue a show cause order lies with the

Commission, not parties.¹ Staff does not believe that the Commission should exercise its discretion to issue a show cause order at this time. Docket No. 20180055-GU is in its initial stages and discovery has not yet occurred. As the record is developed in Docket No. 20180055-GU, staff will have the opportunity to review and monitor the evidence and issues presented. If any matter appears to rise to the point where a show cause order is necessary, staff will bring the matter to the Commission for consideration.

Staff also recommends that Peoples' alternative Petition for Declaratory Statement be dismissed. The purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance to avoid costly administrative litigation. *See Chiles v. Department of State, Division of Elections*, 711 So. 2d 151, 154 (Fla. 1st DCA 1998).² Peoples filed its request for a declaratory statement after it initiated litigation against Leesburg and SGCC in Docket No. 20180055-GU. Peoples' Petition then asks the Commission to declare who it should litigate against, either Leesburg or SSGC. However, it appears Peoples has already answered its own question as to whom to litigate against. Therefore, a declaratory statement is neither necessitated nor would it be helpful to avoid litigation.

Moreover, a declaratory statement is not an appropriate remedy where there is related pending litigation. *Couch v. Florida Dept. of Health and Rehabilitative Services*, 377 So. 2d 32 (Fla. 1st DCA 1979). Because Peoples filed its request for a declaratory statement after it already initiated litigation against Leesburg and SGCC in Docket No. 20180055-GU, it is inappropriate for the Commission to opine in a declaratory statement on the same matters. "[T]he rule is declaratory statement proceedings are not properly filed on issues simultaneously litigated in judicial or other administrative proceedings." *Gopman v. Dep't of Educ.*, 908 So. 2d 1118, 1123 (Fla. 1st DCA 2005).³

¹See Order No. PSC-10-0425-PCO-GU, issued Oct. 18, 2010, in Docket No. 100315, *In re: Complaint by Miami-Dade Cty. for Order Requiring Fla. City Gas to Show Cause Why Tariff Rate Should Not Be Reduced & for the Comm'n to Conduct A Rate Proceeding, Overearnings Proceeding, or Other Appropriate Proceeding Regarding Fla. City Gas' Acquisition Adjustment* where the Commission stated, "The purpose of our show cause procedures is to address specific instances where a utility knowingly refuses to comply with, or willfully violates, a specific Commission order, rule or statute and to bring the utility into compliance...the decision to invoke the Commission's show cause procedure is ultimately ours."

²See also *Department of Business and Professional Regulation, Div. of Pari-Mutual Wagering v. Investment Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999), where the court held, "A declaratory statement procedure is intended to enable members of the public to definitively resolve ambiguities of law arising in the planning of their future affairs and to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts."

³See also *Fox v. State, Board of Osteopathic Medical Examiners*, 395 So.2d 192 (Fla. 1st DCA 1981) (appropriate to deny petition for declaratory statement where issues raised currently pending in administrative hearings). See also *Exxon Mobile Oil Corp. v. Dep't of Agric. & Consumer Servs.*, 50 So. 3d 755 (Fla. 1st DCA 2010) (stating that an administrative agency must decline to provide a declaratory statement when the statement would address issues currently pending in a judicial proceeding). The purpose of a declaratory statement is to answer the petitioner's questions about how the statutes or rules apply to his own circumstances so that he may select a proper course of action. *Carr v. Old Port Cove Prop. Owners Ass'n, Inc.*, 8 So. 3d 403, 404 (Fla. 4th DCA 2009). See also In Commission Order 21301, issued May 31, 1989, in Docket No. 890415-EI, *In re: Petition of Tampa Electric Company for a declaratory statement regarding proposed transfer of service*, (the Commission denied TECO's request for declaratory statement, because the Commission found answering the request for declaratory statement was not likely to resolve all of previously pending issues.).

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Moreover, it is not proper for the Commission to issue a declaratory statement determining the conduct of third persons. Rule 28-105.001, F.A.C. Peoples' states in its request that an order by Commission declaring who it should negotiate with would require the Commission to declare whether SSGC and/or Leesburg are public utilities. Thus, a declaratory statement would affect the legal obligations and conduct of Leesburg and SSGC, in contravention of Rule 28-105.001, F.A.C.

Finally, Rule 28-105.001, F.A.C., allows a declaratory statement as a means to resolve a controversy covering the applicability of statutory provisions over which the agency has authority. In its Petition, Peoples seems to ask the Commission to interpret Section 180.06, F.S., a statute that is not enforced by the Commission. This would not be appropriate for a declaratory statement.

Conclusion

For the reasons set forth above, the Commission should grant SSGC's and Leesburg's Motions to Dismiss Peoples' Petition.

Issue 3: Should this docket be closed?

Recommendation: If the Commission approves staff's recommendation in Issue 1, the docket should be closed. (Harper)

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, a final order will be issued. Thus, the docket should be closed.